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Administrative Review  
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September 6, 2005

MEMORANDUM TO: Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

FROM: Barbara E. Tillman  
Acting Deputy Assistant Secretary  
for Import Administration

SUBJECT: Issues and Decision Memorandum: Final Results of  
Countervailing Duty Administrative Review: Certain In-shell  
Pistachios from the Islamic Republic of Iran

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**SUMMARY:**

We have analyzed the comments of interested parties in the final results of the above-mentioned countervailing duty (CVD) administrative review covering the period of review (POR) January 1, 2003, through December 31, 2003. The "Analysis of Programs" section below describes the decisions made in this review. Also below is the "Analysis of Comments" section, which contains the Department of Commerce's (the Department's) response to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this review for which we received comments from parties:

Comment 1: Use of Adverse Facts Available

I. Analysis of Programs

On April 7, 2005, in the preliminary results of this review, we found, based on the information supplied by Tehran Negah Nima Trading Company, Inc., trading as Nima Trading Company (Nima) on behalf of itself and its grower, Razi Domghan Agricultural and Animal Husbandry Company (Razi), that all of the programs at issue in the instant review were not used during the POR. See Certain In-shell Pistachios from the Islamic Republic of Iran: Preliminary Results of Countervailing Duty Administrative Review, 70 FR 17653 (Preliminary Results). Parties have commented on our Preliminary Results. For the purposes of these final results, we

continue to find that the programs listed below were not used by Nima and/or Razi during the POR.

A. Programs Determined to Be Not Used

1. Provision of Fertilizer and Machinery
2. Provision of Credit
3. Tax Exemptions
4. Provision of Water and Irrigation Equipment
5. Technical Support
6. Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods
7. Program to Improve Quality of Exports of Dried Fruit
8. Iranian Export Guarantee Fund
9. GOI Grants and Loans to Pistachio Farmers
10. Crop Insurance for Pistachios

II. Total Ad Valorem Rate

The total net subsidy rate for Nima and its grower/exporter, Razi, in this review is 0.00 percent ad valorem.

III. Analysis of Comments

**Comment 1: Use of Adverse Facts Available**

Petitioners<sup>1</sup> argue that the overarching issue in this review is whether Nima, Razi, and the Government of the Islamic Republic of Iran (GOI) have provided sufficient evidence to support a finding that the GOI conferred no countervailable benefits on Nima or Razi during the POR. Petitioners maintain that the record does not contain the evidence necessary for the Department to uphold its finding from the Preliminary Results of a zero net countervailable subsidy in these final results. Petitioners argue that the legal prerequisite for finding non-use is substantial evidence concerning the nature, extent, and scope of each of the programs for the period of time being examined, accompanied by substantial evidence that the responding companies did not receive any benefit under those programs.

Petitioners argue that respondents have failed to cooperate with the Department by not acting to the best of their ability to respond to the Department's questionnaires. Specifically, petitioners argue that respondents withheld information requested by the Department, failed to provide information in a timely manner and in the form required, and otherwise impeded the proceeding. Therefore, argue petitioners, the Department should apply total adverse inferences when selecting among the facts available.

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<sup>1</sup> Petitioners include the California Pistachios Commission (CPC) and its members, as well as a domestic interested party, Cal Pure Pistachios, Inc. (Cal Pure).

Petitioners argue that, just as the respondents in the original investigation failed to meet the minimum requirements for responsiveness, the respondents in the instant review have also failed to meet the same requirements. See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: In-shell Pistachios from Iran, 51 FR 8344 at 8345 (March 11, 1986) (In-shell Pistachios). Moreover, petitioners assert that the Department, in its 2001 administrative review of in-shell pistachios from Iran, in which the respondent company was the Rafsanjan Pistachio Producers Cooperative (RPPC), refused to find that RPPC had not received countervailable benefits despite its denials because the GOI failed to provide copies of relevant legislation and failed to answer specific questions. See Certain In-shell Pistachios from the Islamic Republic of Iran, 68 FR 41310 (July 11, 2003) (2001 In-shell Pistachios).

Petitioners also cite Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Certain Steel Wire Rod from Zimbabwe, 51 FR 29292 (August 15, 1986) (Wire Rod from Zimbabwe). In that case, petitioners argue, the Department based its final determination on best information available due to incomplete questionnaire responses from the government. See 51 FR at 29293. Moreover, petitioners refer to Final Negative Countervailing Duty Determination: Certain Fresh Cut Flowers from Kenya, 52 FR 9522 (March 25, 1987) (Flowers from Kenya). In that case, petitioners assert that the Department chose not to apply best information available, and, in doing so, distinguished the facts associated with Flowers from Kenya with those in the In-shell Pistachios case, stating that in In-shell Pistachios, no evidence substantiating the statements of denial of the existence of programs or preferential provision of benefits under the programs was provided, whereas in Flowers from Kenya, the Government of Kenya provided timely responses as well as relevant laws and regulations. See Flowers from Kenya at 9524.

Petitioners state that the Department requested on four separate occasions that the GOI provide the Department with information regarding the total exports of subject merchandise to the United States, as well as the total exports of subject merchandise to the United States by Nima, and on three separate occasions, the GOI failed to respond. Petitioners maintain that when the GOI did answer the Department's questions on exports, the GOI provided an answer which did not match the data provided by the company. Therefore, petitioners conclude, because the GOI never stated that its customs authorities do not maintain export statistics, the respondents failed to cooperate to the best of their abilities by withholding information.

Petitioners also assert that on three separate occasions, the Department requested that the GOI respond to whether Nima and Razi were members of any agricultural cooperatives in Iran. Petitioners state that although the GOI responded on each occasion that neither Nima nor Razi were members of any such cooperative, the record evidence does not support the GOI's statements. Petitioners maintain that although the GOI provided certifications from both RPPC and the Domghan Pistachio Producers Cooperative (DPPC), the GOI has stated elsewhere that farmers are usually members of their local cooperative.

Petitioners argue that when asked by the Department to provide membership lists of the RPPC and DPPC, the GOI responded that both cooperatives are private entities and their membership lists are not available to the public or the government. Petitioners thus question the validity of the GOI's certification of Nima and Razi's non-membership in any cooperative, given the GOI's statement that the membership lists are not available to the government. Moreover, petitioners argue that it is impossible to reconcile the statement that cooperative membership lists

are not available to the government with the GOI's statement that Iran's Ministry of Agriculture oversees the executive and financial activities of agricultural cooperatives.

Furthermore, petitioners argue that Nima, in its questionnaire responses, also provided lists of agricultural cooperatives that do not reconcile with the list of pistachio cooperatives named on page 47 of the Iranian Ministry of Agriculture's report on the pistachio industry (IMA Report). Of particular note, petitioners maintain that the IMA Report lists three pistachio cooperatives registered in the city of Damghan, whereas the information provided by respondents only lists one cooperative in that area.

Petitioners argue that not only did respondents fail to supply the Department with the general and statistical information that it requested, but the respondents also failed to provide sufficient information for the Department to analyze the three elements of a countervailable subsidy, namely, financial contribution, benefit, and specificity.

With respect to seven of the ten programs under review, *i.e.*, Provision of Fertilizer and Machinery, Provision of Credit, Tax Exemptions, Provision of Water and Irrigation Equipment, Technical Support, Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods, and Program to Improve Quality of Exports of Dried Fruit, petitioners maintain that the Department has applied adverse inferences when analyzing these programs in each segment of the proceeding. Petitioners argue that respondents have not placed any information on the record of the instant review to warrant a change to the Department's past practice.

Regarding the Provision of Fertilizer and Machinery program, petitioners maintain that as a direct result of the respondents' and the GOI's failure in the investigation to provide the Department with the laws and regulations applicable to this program, the Department applied best information available when calculating the benefit to respondents from this program. In the new shipper reviews,<sup>2</sup> petitioners argue, the GOI stated that this program had been terminated. However, argue petitioners, in a subsequent proceeding involving pistachios from Iran as well as in the instant review, the GOI did not provide copies of the requested legislation regarding the termination of this program. Moreover, petitioners maintain that despite the GOI's statements that it did not provide Nima or Razi with benefits under the Provision of Fertilizer and Machinery program, it did not comply with the Department's requests for information regarding the GOI's records of benefits kept pursuant to the program.

Moreover, petitioners assert that Nima failed to provide the Department with information on this program for the entirety of the average useful life (AUL) of the pistachio industry, *i.e.*, 10 years, as requested in the Standard Questions Appendix of the Department's questionnaire. Petitioners assert that in the new shipper reviews, the Department applied adverse facts available because the GOI failed to provide documentation corroborating its statement that it had eliminated this program in 1992 and because Nima failed to demonstrate that its grower had not received non-recurring benefits during the POR and the preceding nine years.

With respect to the Tax Exemptions program, petitioners argue that the GOI failed to provide information on this program, including copies of the laws and regulations governing this

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<sup>2</sup> Certain In-shell Pistachios and Certain Roasted In-shell Pistachios from the Islamic Republic of Iran: Final Results of New Shipper Countervailing Duty Reviews, 68 FR 4997 (January 31, 2003) (Pistachios New Shipper Reviews).

program, on three occasions, and instead only submitted a copy of Article 81 of the tax law, which was effective up to January 1999. Petitioners assert that not only is the evidence provided by the GOI not contemporaneous with the POR, but it also fails to respond to the Department's specific question. Moreover, petitioners state that the tax law submitted by the GOI, Article 81, only contains the tax exemption, and not the revocation of that exemption. Therefore, petitioners state that the Department cannot assess whether the program is countervailable. Petitioners argue that, when faced with a similar set of facts in other cases, the Department resorted to adverse inferences when selecting from the facts available. See Final Affirmative Countervailing Duty Determination: Certain Cold-rolled Carbon Steel Flat Products from France, 67 FR 62111 (October 3, 2002), and the accompanying Issues and Decision Memorandum at Comment 8 (Cold-rolled from France).

Additionally, petitioners argue that in response to the Department's questions about the Provision of Credit program, the GOI responded that the only government loans available to the pistachio industry were for the promotion of pistachio processing terminals. Petitioners maintain that Nima's repeated denials of receiving any loans from the GOI are not credible given the GOI's lack of substantive responses. Petitioners assert that the Department has stated that it cannot evaluate company responses without complete and detailed information from the government regarding alleged subsidies. See Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders: Certain Welded Carbon Steel Pipe and Tube Products from Yugoslavia, 50 FR 53360 at 53361 (December 31, 1985) (Pipe and Tube from Yugoslavia).

Regarding the Provision of Water and Irrigation Equipment program, petitioners argue that not only did the GOI fail to provide the basic laws and regulations relevant to the program, the GOI also failed to furnish the Department with a schedule of water and irrigation fees to which pistachio farmers are subject. Moreover, petitioners argue, the GOI never fulfilled its promise to submit to the Department a copy of Article No. 34/709 that allegedly establishes a water surcharge assessed on pistachio farmers in 1992. Petitioners also maintain that Nima did not provide information on this program for nine years previous to the POR, nor did it provide information on Razi's operations for those nine years.

Petitioners state that with respect to the Technical Support program, respondents did not answer the standard questions, grant, or the loan and loan benchmark appendices. Instead, argue petitioners, both the GOI and Nima set forth an overly-general description of the GOI's technical support with no indication of whether the information provided was contemporaneous with the POR. Petitioners also state that the Department should recognize that technical support can be provided in a number of ways (*i.e.*, cash or in-kind assistance), many of which would not be recorded in Nima's income statements or financial reports. One example of such in-kind assistance given by petitioners includes programs to promote the export of Iranian pistachios.

With respect to the Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods program, petitioners argue that the GOI failed to respond to the appropriate appendices and, where it did answer the questions, it simply repeated the same statement for every answer. Moreover, petitioners assert, the GOI did not provide the Department with copies of the laws and regulations related to this program, as requested. Petitioners maintain that although Nima denied the receipt of benefits from the GOI's Duty

Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods program, Nima never responded to the standard questions or tax appendices.

Petitioners argue that the GOI also failed to provide information on the Program to Improve Quality of Exports of Dried Fruit. Petitioners point out that the GOI did claim that the program had not yet been implemented and funding for the program was limited, but it then went on to claim that the program affected only one percent of all pistachio farms in Iran. Petitioners assert that these inconsistent statements do not allow the Department to properly analyze this program. Moreover, petitioners state the Nima failed to respond to the standard questions, grant, and loan and loan benchmark appendices with respect to this program.

With respect to the three new programs upon which the Department initiated an investigation in the instant review, *i.e.*, the Iranian Export Guarantee Fund, GOI Grants and Loans to Pistachio Farmers, and Crop Insurance for Pistachios programs,<sup>3</sup> petitioners argue that the respondents failed to cooperate to the best of their abilities with the Department's requests for information. Regarding the Iranian Export Guarantee Fund, petitioners argue that the GOI only provided a partial translation of the applicable law and failed to provide the Department with an explanation of the types of records maintained by the GOI. Moreover, petitioners argue, the GOI failed to supply the Department with information on the number of applicants and beneficiaries of this program, as requested. Petitioners also maintain that the GOI has stated that the benefits associated with this program are contingent upon export. However, petitioners point out that the GOI did state that neither Nima nor Razi accrued benefits under this program.

Petitioners maintain that these two statements from the GOI cannot be reconciled, as there is no evidence on the record that Nima or Razi informed the GOI that they renounced their accrued benefits under the Iranian Export Guarantee Fund. Petitioners maintain that just because Nima has not yet applied to receive its export subsidy does not mean that it will not do so in the future.

Petitioners argue that the GOI also failed to respond to the Department's questions regarding the GOI Grant and Loan program. For example, argue petitioners, the GOI repeatedly responded to questions in the loan and loan benchmark appendix by stating that neither short-term nor long-term loans were provided under this program, and, therefore, this section is not applicable. Petitioners state that such an answer can hardly be considered responsive. Moreover, petitioners argue that the Department cannot allow the GOI to shirk its obligation to respond substantively to the Department's questions by simply denying that it provided benefits to Nima or Razi.

With respect to the GOI's Crop Insurance program, petitioners argue that the GOI's responses to the Department's questionnaires, including the appendices, were incomplete. Specifically, petitioners maintain that instead of providing the Department with copies of the relevant laws and regulations governing this program, the GOI instead provided a 12-page document describing the Iranian crop insurance program. Petitioners argue that, from this document, it appears that the GOI subsidizes farmers' insurance premiums, but because there is no official copy of the law on the record, the Department is unable to determine whether the GOI subsidizes part or all of such premiums.

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<sup>3</sup> See the October 27, 2004, memorandum to Melissa G. Skinner, Director, AD/CVD Operations, Office 3, from the Team, Re: New Subsidy Allegations.

Moreover, petitioners state that the GOI provided the Department with information on this program for the period March 21, 2001, through March 20, 2003, leaving most of the POR of the instant review unaccounted for. Further, petitioners argue that the statement made by the GOI that the amount of the crop insurance subsidy for the March 21, 2001, through March 20, 2003, period was zero contradicts the document provided by the GOI, which stated that the GOI had determined to subsidize insurance premiums.

Petitioners argue that because the respondents have failed to cooperate by not providing the Department with the most basic information by the deadlines for submission or by providing incomplete information, the Department may use an adverse inference when selecting among the facts available. Petitioners argue that the Department should select no less than 99.52 percent ad valorem, the rate from the original investigation, as adverse facts available. Petitioners maintain that using a rate from a countervailing proceeding associated with in-shell pistachios other than that from the original investigation would benefit the respondents.

Petitioners point out that the Department's application of rates based on best information available (BIA) or facts available has a long history. Petitioners point to Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185 at 1190-91 (Fed. Cir. 1990) (Rhone Poulenc), where the Court of Appeals for the Federal Circuit (CAFC) affirmed the Department's use of BIA. Petitioners state that although BIA has been replaced by adverse facts available, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA) follows the reasoning set forth in Rhone Poulenc.<sup>4</sup>

In its rebuttal brief, Nima argues that petitioners' allegation that the respondents failed to provide information and did not cooperate to the best of their ability is not correct and is indeed far from reality. Nima asserts that both Nima and Razi responded to the Department's questionnaires accurately and in detail. Moreover, Nima states that the accuracy of both Nima and Razi's responses was verified by the Department in the anti-dumping (AD) review (POR: 07/01/02 to 6/30/03) of in-shell pistachios in June 2004. Nima points out that the AD verification included a detailed examination of company documents, most of which, such as the financial records of both companies, have been submitted on the record of the instant review.

Moreover, Nima asserts that respondents provided detailed documents regarding the subsidy programs at issue in the instant review. Nima argues that it is clear that neither it nor Razi received any subsidy under any program.

#### The Department's Position:

In cases where the government has responded on behalf of a non-responding company, the Department has used the government response to the extent that it serves to establish non-use of certain programs. See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Belgium, 58 FR 37273, 37274 (July 9, 1993); Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia, 64 FR 73155, 73155 and 73162; and Comment 1 of the January 15, 2002, Issues and Decision Memorandum that accompanied the Final Affirmative Countervailing Duty

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<sup>4</sup> See Statement of Administrative Action, URAA, H. Doc. No. 316, Vol. 1, 103d Cong. (1994) (SAA).

Determination: Stainless Steel Bar From Italy, 67 FR 3163 (January 23, 2002). The aforementioned cases all involve instances in which the foreign governments provided non-use information on behalf of non-responding companies. However, in certain instances in which the company is able to establish non-use without an accompanying or complete government response, we must analyze the response provided by the companies to determine if they are sufficient to establish non-use. In the instant case, we find that the companies involved have provided sufficient information with which the Department has been able to establish non-use.

In this review, we find that Nima and Razi did fully cooperate with the Department's requests for information. Nima submitted timely and complete responses to all of the Department's questionnaires with respect to the programs at issue, their financial records, and their company structure. We disagree with petitioners' statement that the record does not contain the necessary evidence to uphold the Department's finding in the Preliminary Results of a zero net countervailable subsidy.

Specifically, we disagree with petitioners that for the Provision of Fertilizer and Machinery and Provision of Water and Irrigation Equipment programs that Nima and Razi failed to provide the Department with information on these programs for the entirety of the AUL. In their questionnaire responses, Nima and Razi maintained that they have never received any capital inputs nor assistance from the GOI under either program. There is nothing on the record to indicate that Nima and Razi were not including in their response the entirety of the AUL when answering the questions with respect to these two programs. Moreover, in their December 13, 2004, supplemental questionnaire response, the GOI stated that, with respect to the Provision of Water and Irrigation Equipment program, it did not provide any assistance to Nima or its grower prior to the POR.

We also disagree with petitioners that the record does not support respondents' statements that neither Nima nor Razi used the following programs: Provision of Credit, Tax Exemptions, Technical Support, Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods, Program to Improve Quality of Exports of Dried Fruit, Iranian Export Guarantee Fund, GOI Grants and Loans to Pistachio Farmers, and Crop Insurance for Pistachios programs. Nima and Razi repeatedly stated that they did not use these programs nor did they apply for or receive benefits from these programs during the POR. We have analyzed Nima and Razi's financial records submitted on the record of the instant review and have found no evidence to contradict respondents' statements of non-use. Moreover, we note that there is no evidence on the record to support petitioners' assertion that the Technical Support program could include in-kind assistance. Absent any evidence on the record of the instant review to support the claim that Nima or Razi received any in-kind assistance, we find that no in-kind benefits were received by either Nima nor Razi during the POR.

Moreover, we disagree with petitioners' reliance on Wire Rod from Zimbabwe. In that case, the Department based its final determination on best information available (BIA) because it had received a partial response from the government of Zimbabwe and no response at all from the manufacturers, producers, or exporters of wire rod in Zimbabwe (see Wire Rod from Zimbabwe at 29293). In the instant case, the Department has received complete responses from Nima and Razi, the producers/exporters subject to the review.

In the case of Flowers from Kenya, to which petitioners also point, we stated that we invoke the BIA provision of the Tariff Act of 1930, as amended (the Act), only in circumstances



where no information is provided or where information provided by the respondent is so inadequate and incomplete that the adverse inferences associated with using BIA are justified. See 52 FR at 9524. Although in Flowers from Kenya we pointed to In-shell Pistachios as a textbook example of the use of BIA, the facts in the original investigation of in-shell pistachios and the instant review are different. In In-shell Pistachios, we received an untimely response from the GOI and no response at all from the growers, processors, or exporters of subject merchandise in Iran. See 51 FR at 8344-5. As stated above, in the instant review, we have received timely responses from the producers/exporters subject to this review and timely, albeit deficient, responses from the GOI.

Petitioners' reliance on Cold-rolled from France is also misplaced. In that case, the Department preliminarily relied on adverse facts available to determine that benefits given under the European Coal and Steel Community (ECSC) Article 55 research grants were de facto specific. However, the Department reversed its finding in the final, stating that the ECSC Article 55 program was not countervailable. See Cold-rolled from France at Comment 8. Further, at no time did the Department apply adverse facts available with respect to the issue of the French respondent's usage of a program as a result of the Government of France's inability to cooperate with the Department.

With respect to Pipe and Tube from Yugoslavia, we note that, while there appear to be some similarities between these two cases, there is also a significant difference. In that case, the Department found that both the government and company responses were unusable. See Pipe and Tube from Yugoslavia at 53661. In the instant case, the companies have responded to our requests for information, and because they have reported total non-use, we have found their responses sufficient for purposes of this review.

We also note that the GOI's participation in the Pistachios New Shipper Reviews was at a level comparable to their participation in the instant review. Although we did apply partial adverse facts available in the Pistachios New Shipper Reviews, we based our decision to apply partial adverse facts available on the failure of Nima and its grower at the time, Maghsoudi Farms, to provide information regarding Maghsoudi Farms' production facilities in the manner explicitly and repeatedly requested by the Department, not on the failure of the GOI to respond to the Department's requests for information. See Pistachios New Shipper Reviews at Comment 1.

Section 782(e) of the Act provides that the Department shall not decline to consider information which does not meet all applicable requirements established by the Department, but is nonetheless usable and meets articulated standards. In this case, we determine that respondents met the criteria necessary for us to consider the information they submitted on the record. Specifically, we find that the information Nima and Razi submitted was (1) timely, (2) verifiable, to the extent that it was within the respondents' power to perform verification (3) able to serve as a reliable basis on which to base our Final Results, (4) provided in a manner that indicates that Nima and Razi were acting to the best of their ability to meet the requirements established by the Department, and (5) was not unduly difficult to use.<sup>5</sup>

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<sup>5</sup> Due to the lack of normal diplomatic relations between the United States and Iran, officials from the Department were not able to travel to Iran to conduct verification. Thus, the Department's inability to verify was in no way the result of Nima or Razi's refusal to cooperate.

We acknowledge that the GOI's description and documentation of the programs in the instant review was not complete. In the ongoing and future reviews, we will continue to seek out full information from the GOI concerning the manner in which these programs operate and the extent to which they provide benefits to exporters and/or the pistachio industry. However, on balance, we find that the information supplied by the GOI and the respondent companies in the instant review can be relied upon for the purposes of our analysis. Accordingly, there is no need to apply the provisions of 776(A) or (B) of the Act in this case. Thus, we find that neither the application of facts available, nor an adverse inference, is warranted in the instant review.

**RECOMMENDATION:**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the determination in the Federal Register.

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Agree

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Disagree

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Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

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Date